

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 55 (Sub-No.745X)

CSX TRANSPORTATION, INC—ABANDONMENT EXEMPTION—  
IN FLOYD COUNTY, KY.

Decided: December 1, 2015

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 11.4 miles of railroad line between milepost COQ 0.0 near Prestonsburg and milepost COQ 10.1 near David, in Floyd County, Ky. (the Line).<sup>1</sup> Notice of the exemption was served and published in the Federal Register on November 2, 2015 (80 Fed. Reg. 67,489). The exemption is scheduled to become effective on December 2, 2015.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on November 3, 2015, recommending that two conditions be imposed on any decision granting abandonment authority. In the EA, OEA stated that the National Geodetic Survey (NGS) had indicated that nine geodetic station markers could be affected as a result of any post-abandonment salvage activities. Therefore, OEA recommended that CSXT be required to consult with and notify NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any geodetic station markers.

In the EA, OEA noted that CSXT served a historic report on the Kentucky Heritage Council, the State Historic Preservation Office (SHPO), pursuant to 49 C.F.R. § 1105.8(c). OEA stated that the SHPO has not provided its opinion regarding the proposed abandonment, and OEA therefore recommended that CSXT be required to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places (National Register) until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 30618 (formerly 16 U.S.C. § 470f), has been completed. OEA also recommended that CSXT be required to report back to OEA regarding any consultations with the SHPO and the public and be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment

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<sup>1</sup> The Board previously authorized CSXT to abandon most of the line in 2004. CSX Transp.—Aban. Exemption— in Floyd Cty., Ky., AB 55 (Sub-No. 645X) (STB served Feb. 9, 2004). CSXT indicates, however, that it again seeks an exemption to abandon the Line because the deadline to consummate the prior abandonment authority expired on April 23, 2008.

(including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

OEA received one new comment in response to the EA by the November 19, 2015 due date. OEA issued its final EA on November 19, 2015.

In the final EA, OEA states that in a November 18, 2015 letter, the Kentucky Department for Environmental Protection, Division of Water (DOW), notes that there is a high rate of flooding in the area of the proposed abandonment. OEA notes that DOW has concerns that leaving all structures on the Line in place could pose flood hazards. DOW recommends that CSXT remove and remediate any structures that pose any flooding hazards (in the event a trails use agreement is not reached) or develop a management plan that would be implemented should CSXT choose to leave the structures in place. To ensure DOW's concerns are appropriately addressed, OEA recommends that the following new condition be imposed: Prior to the commencement of any salvage activities, CSXT shall consult with DOW regarding flooding hazards that could result from bridges, culverts, and other structures that might worsen flooding events should CSXT choose to leave them in place.

Consistent with OEA's recommendations, the two conditions recommended in the EA and final EA and the new condition recommended in the final EA will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On November 2, 2015, the City of Prestonsburg, Ky. (the City), filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with CSXT for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, the City has also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on November 2, 2015, as corrected on November 12, 2015, CSXT states that it agrees to negotiate with the City for interim trail use.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and CSXT is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, CSXT may fully abandon the Line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The City also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that CSXT be prohibited from disposing of the corridor,

other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The City's justification for its request is that this corridor has considerable value for recreational trail purposes and that the 180-day period is needed to assemble and review title information, complete a trail plan, and begin negotiations with CSXT.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring the City to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from December 2, 2015, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on May 30, 2016, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until May 29, 2016. If a trail use agreement is reached for a portion of the right-of-way prior to May 29, 2016, CSXT must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

On November 16, 2015, Floyd County Judge Executive Benjamin L. Hale submitted a letter requesting that the Board postpone and reconsider the proposed abandonment to allow "further exploration for all possibilities" for the use of the Line "in consideration of Floyd County's continued economic development plans." On November 17, 2015, CSXT replied in opposition to the request. The Board will address the request for reconsideration in a subsequent decision. In the meantime, the Section 106 historic preservation condition imposed in this decision is a barrier to consummation that prevents CSXT from undertaking any salvage,

exercising its abandonment authority, or filing its notice of consummation until the Section 106 process is complete and the Board has issued a decision removing the condition.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on November 2, 2015, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with CSXT for trail use for the rail line, for a period of 180 days from the service date of this decision and notice, until May 29, 2016, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until May 30, 2016. The abandonment is also subject to the conditions that CSXT shall: (1) consult with and notify NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any geodetic station markers; (2)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register until the Section 106 process of the NHPA, has been completed, (b) report back to OEA regarding any consultations with the SHPO and the public, and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; and (3) prior to the commencement of any salvage activities, consult with DOW regarding flooding hazards that could result from bridges, culverts, and other structures that might worsen flooding events should CSXT choose to leave them in place.
3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, CSXT may discontinue service. CSXT shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until May 30, 2016, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.
4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any

potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by May 29, 2016, for the right-of-way, interim trail use may be implemented. If no agreement is reached, CSXT may fully abandon the Line, subject to any outstanding conditions.

9. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.